INTRODUCTION TO CIVIL DISCOVERY PRACTICE IN THE SOUTHERN DISTRICT OF ALABAMA

Civil Practice Federal Court Committee
1998

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INTRODUCTION

A committee of litigation lawyers from various specialties (with input from the federal bench), and representing various interests, has developed this booklet on local discovery practice. It is not meant to serve as law or as binding rule; it is simply a general and informal guide about how the rules applicable to civil discovery are ordinarily interpreted and applied in this District. The Court may, of course, vary its usual procedures to suit the needs of a particular case.

Discovery practice in this District, of course, follows the Federal Rules of Civil Procedure (hereinafter "Federal Rules"), and the Local Rules of the U.S. District Court for the Southern District of Alabama (hereinafter "Local Rules"), where the rules apply. Neither the rules nor the cases, though, expressly cover all aspects of discovery. Many of the gaps have been filled informally by trial lawyers and judges, and over the years in this District, a custom and usage has developed in several recurring discovery situations.

We believe that this work may be of some use to all lawyers. As expected, not everyone on the committee agrees with everything in this booklet, or with the way certain aspects of discovery are handled. The Committee resolved these disagreements, for the purpose of these guidelines, by discussing them thoroughly during its monthly meetings and then adopting the position taken by a majority of its members. Even though a consensus on all issues was not reached, we offer these guidelines for whatever help they may be.

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I. DISCOVERY IN GENERAL.

A. Courtesy. It may be appropriate to note first that discovery in this District is normally practiced with a spirit of ordinary civil courtesy and honesty. Local lawyers in the Court are justifiably proud of the normally courteous practice which has been traditional at the Bar in the Southern District.

The revised Federal Rules have embraced the concept of encouraging the informal, courteous, direct resolution of problems between lawyers prior to bringing any such issue to the Court for formal resolution. The Court expects that all lawyers who attempt to resolve discovery disputes informally will act in a courteous and professional manner.

B. Discovery Orders. In each civil case in this Court, the district judge or magistrate judge will issue an initial discovery and scheduling order. All lawyers should be aware that there are some variations in these orders from judge to judge, and each order should be thoroughly read and understood to ensure compliance with each requirement of the order in each case.

C. Voluntary Disclosure. As background, Federal Rule 26, in general, defines the scope and the proper objects of discovery, including the initial phase of discovery.

In particular, Federal Rule 26(a)(1) requires an initial, voluntary disclosure of the core witnesses and evidence supporting the claims and defenses asserted in the parties' respective pleadings. In other words, practitioners regard this initial disclosure as encompassing the sources of the evidence which supports the parties' "theories of relief" and "theories of defense," as if there were standing, Court-ordered interrogatories and requests for production directed to the pleadings.

While there is some dispute about the breadth of the initial disclosures (because the rule is relatively new and untested by local usage or appellate decisions), it is the practice in this District for

counsel, at the earliest possible time, to contact and meet with opposing counsel to discuss the nature of the case and the claims and defenses, as well as discovery and scheduling as required by Federal Rule 26(f).

At the initial Federal Rule 26(f) meeting, counsel should discuss, among other things, voluntary disclosure of core witnesses and evidence. As a practice, counsel should attempt to reach a mutual understanding about the breadth of the initial, voluntary disclosures, and subsequently make those disclosures accordingly. The parties should also attempt to agree on the scope of supplementation of the initial disclosure. If no mutual agreement can be reached, then counsel are expected to disclose and fully describe the dispute in the Federal Rule 26(f) Report which is to be filed within 10 days after the meeting. Where there is a dispute about the breadth of the initial disclosures, the Federal Rule 26(f) Report may include a request for a Federal Rule 16 conference.

In this District, voluntary disclosure must occur within 20 days after the initial meeting of counsel under Federal Rule 26(f). [See Local Rule 26.1.]

The voluntary disclosure rules do not require that an exhaustive investigation be undertaken as a basis for the disclosures, but does require some degree of limited investigation by counsel.

D. Continuing Obligation. The Federal Rules expressly provide that in many instances a party is under a duty to supplement prior answers and responses to discovery. [See Federal Rule 26(e).] With the addition of the requirements for initial voluntary disclosure, counsel should be mindful that the supplementation requirement applies to the initial disclosure as well as to the traditional formal discovery.

Typically, the Court's initial discovery scheduling order will specify the deadlines for

supplementation of the initial disclosure. If the order does not include a supplementation schedule, lawyers should supplement their initial voluntary disclosure in strict compliance with Federal Rule 26(e)(1). Generally, the phrase "an appropriate interval," as used in Federal Rule 26(e)(1), absent special circumstances, will be no longer than 30 days after a party learns of the supplementary material.

The obligation of counsel to supplement answers to interrogatories and requests for production relates directly to the specific items requested. Fairness and personal integrity may suggest a broad range of supplementation for such discovery. A party may not, by placing supplementation language at the beginning of his or her discovery request, vary the provisions of the Federal Rules of Civil Procedure.

E. Preamble Matter in Discovery Requests. Lengthy and complex preambles and definitions in discovery requests are discouraged, particularly where they operate to give unexpected breadth or surprising effect to the meaning of words which are otherwise reasonably clear.

F. Reasonable Drafting and Reading. Discovery requests should be drafted, read, and answered in a reasonable, common-sense manner.

G. Stipulations. Stipulations in accordance with Federal Rule 29 are encouraged and honored by the Court, unless the stipulation is contrary to a Court order. Stipulations extending the period of time to respond to discovery procedures must follow Federal Rule 29(2).

H. Timeliness of Discovery Responses; Sanctions. The Federal Rules set out explicit time limits for responses to discovery requests, and these are the dates by which a lawyer should answer; he or she should not await a Court order. A lawyer who cannot submit a timely response should move for an extension of time in which to answer and should inform opposing counsel about the

motion for additional time, so that, in the meantime, no motion to compel a response will be filed. While the Court may sometimes excuse late answers, it will almost never honor late objections, so it is wise to file timely objections even when substantive responses will be unavoidably late.

Because lawyers are expected to respond when the rules provide, Federal Rule 37(a)(4) provides that if an opposing lawyer must go to Court to make the recalcitrant party answer, the moving lawyer may be awarded expenses and counsel fees spent in filing (and, if necessary, arguing) the motion to compel. Federal Rule 37 is enforced in this District strictly according to its tenor.

Once a Court order is issued compelling discovery, an unexcused failure to provide a timely response is treated by the Court with the special gravity which it deserves. Violation of a Court order is always serious and may be treated as contempt, or may be grounds for entry of judgment, an order with respect to facts or claims related to the discovery that was the subject of the Court's order, or some other appropriate and measured sanction.

I. <u>Discovery Cut-Off</u>. The District Court ordinarily sets a discovery cut-off in some form, although the manner of setting and extending it may vary significantly from judge to judge.

Each judge applies the discovery cut-off date to mean that all discovery must be completed by that date. For example, interrogatories must be served more than thirty days prior to the cut-off date. Untimely discovery requests are subject to objection on that basis.

The parties may conduct discovery (primarily taking depositions) by agreement after the discovery cut-off. Lawyers should be aware, however, that if problems arise during the depositions (such as instructions not to answer questions or failures to produce documents at the depositions) the Court may refuse to resolve the disputes because the depositions are being taken after the discovery

cut-off, and without the Court's permission. To ensure that the Court will hear and resolve discovery disputes after the discovery cut-off, either party (preferably both by joint motion) should file a motion with the Court and obtain the Court's approval to conduct discovery out of time. The motion should indicate whether all parties agree to the additional discovery and should notify the Court of the effect, if any, that the additional discovery will have on existing deadlines. As a matter of practice, the Court does not favor discovery after the cut-off which forces changes in other pretrial deadlines.

Even though the Court occasionally may allow additional discovery upon motion, it is a serious mistake to count upon the likelihood of an extension. When allowed, an extension is normally made upon a showing of good cause for the extension of discovery (including due diligence in the pursuit of discovery prior to cut-off date), specifying the additional discovery needed, its purposes, and the time in which it can be completed.

Motions for extension of discovery time are normally treated with special disfavor if they are filed after the discovery cut-off date.

J. <u>Pretrial Disclosures</u>. The Federal Rules specifically require the parties, at least 30 days before trial, to exchange evidence which may be used at trial. [See Federal Rule 26(a)(3).] However, the use of detailed pretrial orders in this District duplicates the requirements of the Federal Rule. Accordingly, in cases where the trial judge implements a detailed pretrial order, the lawyers in this District do not duplicate the pretrial disclosures under the Federal Rule. The Federal Rule creates a duty to exchange pretrial disclosures where there is no detailed pretrial order covering trial evidence.

Please note that individual judges and magistrate judges may require the disclosure of "impeachment evidence" prior to trial. Again, trial counsel should read carefully all pretrial orders.

K. Invocation of Privilege or Work-Product Protection as Justification to Deny Production and Responses. The Federal Rules require a party withholding discoverable information because of a privilege or because it is protected as trial preparation material to describe the information being withheld in the initial discovery response. That response should include at least the information specified in Federal Rule 26(b)(5). This is an affirmative duty of the party withholding the evidence and does not require a specific question by the opposing party. If the requesting party desires more information in order to assess the applicability of the privilege or protection, counsel for the parties should attempt to resolve the matter informally. If this fails, and the requesting party has a good faith belief that the privilege or protection does not exist or has been waived, the requesting party may demand the production of a "privilege log" covering the withheld information.

In this District, a privilege log by the withholding party provides the following information:

1. The objection, including a specific description of the privilege(s) or protection(s) upon which it is based;

2. Supporting factual detail which should be provided, to the extent that it will not destroy the privilege asserted (see paragraph 6 below), as follows:

   a. For documents (individually or by category):

      (i) A description of what the document is.

      (ii) Its date.

      (iii) The name, address, job title and employer of the author of the document, or the person taking the statement or the like.

      (iv) The subject of the document.

(v) The persons to whom the document is addressed.

(vi) The persons indicated thereon as having received copies.

(vii) The name, address, job title and employer of any person known or believed to have received or seen the document or any copy or summary thereof.

(viii) The purpose for which the document was created and transmitted.

(ix) The degree of confidentiality with which it was treated at the time of its creation and transmission and since.

(x) Any other facts relevant to the elements of the particular privilege asserted.

b. For oral communications:

(i) The person who made the communication.

(ii) The date on which it was made.

(iii) Persons to whom it was made.

(iv) Persons who were present or were in hearing distance at the time it was made.

(v) The purpose of the communication.

(vi) The subject matter of the communication.

(vii) The general circumstances regarding its confidentiality at the time it was made and since.

(viii) Any other facts relevant to the element of the particular privilege asserted.

3. Where the objection is stated at a deposition, based upon privilege or work-product protection, a clear statement of the precise privilege relied upon should be made. [See Federal Rule 30(d)(1).] However, no recitation of facts at that time should be necessary to prevent the witness from answering a question asking for privileged information. On the other hand, the person asking the

question should be given wide latitude in questioning the witness about all collateral facts in an effort to develop information as to whether or not the privilege does apply. The Court ordinarily views a vague statement of privilege with a jaundiced eye, because that makes it difficult for the person asking the question to know what facts are appropriate subjects of inquiry as being pertinent to whether the privilege applies. Also, the Court is normally harsh on an attorney who asserts privilege and then obstructs inquiry into pertinent collateral facts.

4. Any affidavits used to support a claim of privilege, either with respect to documents or testimony at depositions, should be tested by the rules of evidence.

5. Any agreement between the attorneys to waive or to alter the contents of the privilege log is normally accepted, so long as it does not delay the progress of the case or otherwise interfere with Court management.

6. In the very rare case in which disclosure of information listed above itself would disclose the privileged information, the document may be produced *in camera* for the Court to determine whether the detailed information shown above must be furnished to opposing counsel (no such document should be furnished *in camera* without prior Court approval).

II. DEPOSITIONS.

A. Scheduling. A courteous lawyer is normally expected to make reasonable efforts to accommodate the schedules of opposing lawyers whenever possible. In doing so, a lawyer scheduling a deposition either can do so by agreement with opposing counsel, or by unilaterally noticing the deposition while indicating a willingness to be reasonable about any necessary rescheduling.

B. Persons Who May Attend Depositions. Pursuant to Federal Rule 30(c), the rule of sequestration of witnesses does not apply at deposition without a protective order pursuant to Federal Rule 26(c)(5). Despite this Federal Rule, as a matter of courtesy, counsel for either party planning to have witnesses attend a deposition as spectators pursuant to Federal Rule 30(c) should provide reasonable advance notice to the opposing counsel in order to permit adequate time to seek an appropriate protective order.

Each lawyer ordinarily may be accompanied at the deposition by one representative of each client, and in technical depositions, by an expert.

Lawyers may also be accompanied by records custodians, paralegals, secretaries, and the like, even though they may be called as technical witnesses on such questions as chain of custody or the foundation for the business-record rule, or other technical matters.

While more than one lawyer for each party may attend, only one should question the witness or make objections, absent contrary agreement.

C. The "Usual Stipulation." At the beginning of the deposition the court reporter will ask the lawyers if they agree to the "usual stipulation?" One can normally say "yes" without fear. The "usual stipulation" simply waives a number of deposition technicalities, such as notice of the deposition, signature, competence of the officer administering the oath, filing, notice of filing, and the like. If there is any question, the court reporter will read the stipulation and allow the lawyers to make desired modifications.

One sometimes hears local lawyers say that if the deposition is taken pursuant to the Federal Rules rather than the "usual stipulation," the lawyers must make full, comprehensive and

complete evidentiary objections (as at trial) instead of simple objections to the form of the question. There is no basis in the Federal Rules for that distinction. [See Federal Rules 32(b) and 32(d)(3)(B).]

Of course, lawyers are not required to agree to the "usual stipulation," but most lawyers ordinarily do.

D. Objections at Depositions. Federal Rule 30(d)(1) provides that any objection during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. The comment to this sentence further notes that depositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often used by lawyers to suggest how the deponent should respond. It is the custom and practice in this District to adhere strictly to both the letter and spirit of this rule.

The rule further recognizes that instructions to a deponent not to answer a question can be even more disruptive than objections. Accordingly, the rule provides that a party may instruct a deponent not to answer for only three reasons:

1. To claim a privilege or protection against disclosure (e.g., as work product);

2. To enforce a Court directive limiting the scope or length of permissible discovery; or

3. To suspend the deposition in order to enable presentation of a motion under paragraph (3) of Federal Rule 30(d).

Lawyers in this District adhere strictly to these rules and they are strictly enforced by the Court.

E. Attorney-Deponent Conference During Deposition. Except during normal breaks and for purposes of determining the existence of privilege or the like, normally at the request of the client, a

deponent and his or her attorney should not confer during a deposition. The fact and duration of any such conference may be pointed out on the record and, in the event of abuse, an appropriate protective order or sanctions may be sought.

F. Tape-Recorded and Telephone Depositions. Tape-recorded depositions [Federal Rule 30(b)(4)] and telephone depositions [Federal Rule 30(b)(7)] may be taken either by stipulation or by Court order. In either event, the parties should discuss and agree to the mechanical procedures involved and a deadline for the filing of the transcript if the agreement contemplates transcription.

G. Videotape Depositions. Videotape depositions may be taken pursuant to Federal Rule 30(b)(2) without leave of Court. Videotape depositions are a common practice in the Southern District and procedures for such depositions are routinely agreed to by counsel.

While Federal Rule 30(b)(2) provides that parties are not required to record depositions stenographically when recorded by videotape, a transcript is still required if the deposition is to be offered as evidence at trial or on a dispositive motion under Federal Rule 56. Accordingly, it is the common practice in this District that a stenographic recording also be made of any videotape deposition. If the party noticing the videotape deposition does not intend also to provide for a transcript to be made, then notice should be given to opposing counsel in advance of the deposition so that opposing counsel may arrange for transcription, if desired.

The routine procedures for videotaped depositions usually include the following:

1. The witness shall first be duly sworn on camera by an officer authorized to administer oaths, before whom the deposition is being taken.

2. If any objections are made, the objections shall be ruled upon by the Court on the basis of the stenographic transcript, and, if any questions or answers are stricken by the Court, the videotape and sound recording must be edited to reflect the deletions so that it will conform in all respects to the Court's ruling.

3. The party noticing the videotape deposition shall arrange for the court reporter and videographer to cross-reference the stenographic transcript and the video recording in such a way as to allow the parties to conveniently correlate the videotape with the transcript. Such cross-referencing is necessary for future editing purposes, both pre-trial and during trial.

4. Copies of the videotape recording shall be made at the expense of any parties requesting them.

5. The party desiring to take the videotape deposition shall arrange for and bear the expenses of recording the videotaped deposition, as well as replaying the videotape of the deposition at trial.

6. The party desiring to stenographically record the videotape deposition shall bear the usual expenses for the transcription of the stenographic record. Normally, this will be the same party desiring to take the videotape deposition and bearing the expenses therefor.

7. The party presenting the videotape deposition at trial is responsible for the expeditious and efficient presentation of the testimony and is expected to ensure that it conforms in every respect possible to the usual procedure for the presentation of witnesses and to any evidentiary rulings that necessitate editing of the videotape.

H. Depositions of Experts. Federal Rule 26(b)(4) provides that a party may depose any person who has been identified as an expert whose opinions may be presented at trial. The timing of expert depositions is normally governed by the pretrial order.

Disclosure of reports from experts is required under Federal Rule 26(a)(2)(B). Federal Rule 26(b)(4) provides that where a report from the expert is required, then the deposition shall not be conducted until after the report has been provided. It should be noted that some judges require the production of reports for all experts, retained or otherwise.

I. Depositions of Doctors. The deposition of a medical doctor should ordinarily be scheduled by agreement with the doctor, almost always at the doctor's office or hospital.

If the circumstances require issuance of a subpoena (*duces tecum* or otherwise), the deposition should still be scheduled by agreement if possible. As a courtesy, the lawyer should, prior to or at the time of issuance of the subpoena, notify the doctor of the issuance of the subpoena, the time and place scheduled, what records (if any) have been subpoenaed and the general subject of examination.

III. PRODUCTION OF DOCUMENTS.

A. Oral Requests for Production of Documents. The Civil Rules address formal document production made as part of initial disclosures or pursuant to a Federal Rule 34 request. In addition, many lawyers produce or exchange documents upon informal request, often confirmed by letter. Naturally, a lawyer's word that he or she will produce a document, once given, is the lawyer's bond and should be timely kept.

Requests for production of documents ordinarily should not be made to a deponent on the record at depositions, and, if made, no adverse comment should be made on the record if the request is declined.

B. Production of Documents. When documents are being produced, the following general guidelines, though varied to suit the needs of each case, are normally followed (unless the case is a massive one):

1. Place. The request may as a matter of convenience suggest production at the office of either counsel. The Court expects lawyers to make reasonable accommodation to one another with respect to the place of production of documents.

2. Timing. If a request for production is filed in connection with a deposition notice, lawyers are expected to cooperate to produce the documents before the deposition, in order to encourage cheaper, shorter, and more meaningful depositions.

Although Federal Rule 30(b)(5) provides that a party responding to a request for production at the time of a deposition has the normal 30 or 33 days in which to respond, the Court naturally expects parties to act reasonably in that context. In practice, shorter periods are routinely agreed to, and if not, the Court may be asked to shorten the time. Lawyers are expected to cooperate on such routine matters without Court intervention.

3. Manner of Production. All of the documents should be made available simultaneously, and inspecting attorneys may determine the order in which they look at the documents. While the inspection is in progress, the inspecting attorneys shall also have the right to review again any documents which they have already examined during the inspection.

Under Federal Rule 34(b), the producing party has the option to produce the documents either as they are kept in the usual course of business, or organized and labeled to correspond with the categories in the request. In either event, the producing party, if asked, ought to provide a reasonable informal explanation of records-keeping procedures.

Federal Rule 26(b)(5) governs disclosure of the existence of documents subject to a claim of privilege or other protection from disclosure. If only a portion of a document is covered by a request, but another portion either is not or is privileged, the producing party is expected first to seek cooperation in the reasonable excision or redaction of non-discovered or non-discoverable matter, and only in extraordinary situations to approach the Court on the matter.

Naturally, whatever comfort and normal trappings of civilization are reasonably available should be offered by the party producing the documents.

4. Listing or Marking. The parties may want to use some means of listing or marking the documents which have been produced, so that, later, the produced documents can be differentiated from those which have not been produced. For a relatively few documents, a listing prepared by the requesting attorney (which should be exchanged with opposing counsel) may be appropriate; when a larger volume of documents is involved, the inspecting attorney may want to stamp each document with a sequential number. The producing party should allow such stamping to be done, so long as marking the document does not materially interfere with the intended use of the document. Of course, originals of certain documents (e.g., promissory notes) should be listed rather than marked.

A discovering party may take any reasonable measures to ensure that an accurate record of what was produced, on what date, from whom, and to whom, is created. A responding party is expected to cooperate reasonably.

5. Copying. While photocopies are often prepared by the producing party for the inspecting party as a matter of convenience or accommodation, the inspecting party has the right to insist on seeing originals.

The photocopying of documents will generally be the responsibility of the inspecting party, but the producing party must render reasonable assistance and cooperation. In the routine case where documents are produced in a manageable number, the producing party should allow its personnel and its photocopying equipment to be used with the understanding that the inspecting party will pay reasonable charges. If a particularly large quantity of documents is produced, it may be reasonable for the inspecting party to furnish personnel who will make the copies on the producing party's equipment. If still larger quantities of documents are produced, it may be reasonable for the inspecting party to furnish both the personnel and the photocopying equipment (perhaps by delivery of rental equipment to the premises of the producing party). Lawyers frequently agree to have some or all of the produced documents copied by a commercial copying service. If the inspecting party copies some but not all of the produced documents, the producing party may obtain (at its expense) a set of the copies.

6. Later Inspection. Whether the inspecting party may inspect the documents again at a later date (after having completed the entire initial inspection) must be determined on a case-by-case basis.

7. General. In most situations, the lawyers should be able to reach agreement based upon considerations of reasonableness and convenience. Since the discovery rules contemplate that lawyers and parties will act reasonably in carrying out the objectives of the rules, the Court can be expected to deal harshly with a lawyer or party who acts unreasonably to thwart these objectives.

C. Requests for "All Documents" and the Like. A request for production of documents should be reasonably particularized. A request for "each and every document supporting your claim" is objectionably broad in many cases, but will be evaluated by the Court according to the circumstances of the particular case. If a producing party has a reasonably limited number of documents which can be identified in response to such request, then the request is not overly broad. However, if the range of documents which might conceivably be within the scope of such a request is unreasonably large, or investigation of the matter would be unreasonably burdensome, then the request will generally be considered objectionable. Federal Rule 26(c), Federal Rule 37(a), and the Court's usual scheduling orders all expressly require that disputes about the scope of requested production be addressed in good faith in a lawyer-to-lawyer conference before motions are filed.

D. Non-Party Document Production Subpoenas. A subpoena for document production to a non-party must be served on all parties and must contain the language specified in Federal Rule 45(c) and (d). The Court treats such subpoenas as being subject to the discovery cut-off date, so the subpoenas must be served sufficiently in advance to allow production by the cut-off date. Because of the potential burden on the non-party, the parties should cooperate in ensuring that the inspection is conducted with as little intrusion as possible on the business affairs of the non-party. If the respondent

delivers documents to the party issuing the subpoena, notice of receipt should be given to all parties, and any requests for copies must be honored.

IV. INTERROGATORIES.

A. Number of Interrogatories. Because every case is different, this Court has not adopted a single Procrustean limit on the number of interrogatories in every case. When counsel meet for the Federal Rule 26(f) Conference, they should discuss how many interrogatories will be needed and include their determination in the Report of Parties' Planning Meeting. The Court, when drafting its Federal Rule 16(b) Scheduling Order, will give great weight to the agreement of counsel.

Counsel should not use subparts of interrogatories to evade any limitation on the number of interrogatories set by the Court in the Federal Rule 16(b) Scheduling Order.

If a party considers the number or breadth of interrogatories to be burdensome in the context of a particular case, that party should confer with the party requesting the discovery and try to reach an agreement. If after conferring in good faith the parties cannot reach agreement, the objecting party may of course move for a protective order.

The obligation to confer in good faith may not be satisfied by a letter demanding that the other party fully respond by a certain date or otherwise the writer will file a motion to compel. Good faith requires actually conferring and actually considering the other party's point of view. However, if the other party is non-responsive, then the movant may be excused for failing to confer.

B. Form Interrogatories. The indiscriminate use of "form" interrogatories is inappropriate. Interrogatories should be carefully reviewed to make certain that they are not irrelevant or meaningless in the context of an individual case.

C. Reference to Deposition or Document. Since a party (absent Court order) is entitled to discovery both by deposition and interrogatories (subject of course to the rather stringent limitations in Federal Rule 26(g)(2)), it is ordinarily insufficient to answer an interrogatory by reference to a deposition or document. It may be appropriate, provided the reference is both clear and specific and the referenced material is responsive and complete, for a party answering an interrogatory to adopt certain testimony or language from a document. For example, a response of "see deposition of James Smith" would ordinarily be insufficient as too vague. On the other hand, a response such as "Acme Roofing Company adopts as its answer to this interrogatory the deposition testimony of James Smith, its Secretary, shown on pages 127-145 of the deposition transcript" is more likely to be an adequate response. The practice must be used carefully and in good faith, however, since, for purposes of discovery sanctions, an evasive or incomplete answer is to be treated as a failure to answer. [See Federal Rule 37(a)(3).] The circumstances regarding the clarity of the deposition testimony with respect to the specific interrogatory question, the responsiveness of that deposition testimony to the particular question, and the completeness of the answer are all subject to interpretation according to the particular facts.

D. "Each and Every" Question. Interrogatories should be reasonably particularized. For example, an interrogatory such as "identify each and every document upon which you rely in support of your claim on Count Two" may well be objectionably broad in an antitrust case, though it may not in a suit upon a note or one under the Truth-in-Lending Act.

While there is no bright-line test, common sense, good faith, and the requirements of Federal Rule 26(g)(2) usually suggest whether such a question is proper.

E. Sworn Answers. The Federal Rules require that interrogatories be sworn to by the person answering the interrogatories. General disclaimers "reserving the right to make changes" or otherwise limiting or minimizing the effect of the interrogatory answers are not permissible.

F. Federal Rule 33(d). Federal Rule 33(d) allows a party in very limited circumstances to produce documents in lieu of answering interrogatories. To avoid abuses of Federal Rule 33(d), the Court often enters a Federal Rule 33(d) order which (though it may vary from case to case) usually contains some or all of the following terms, among others:

1. The specification of documents to be produced shall be in sufficient detail to permit the interrogating party to locate and identify the records and to ascertain the answer as readily as could the party from whom discovery is sought.

2. The producing party shall make its records available in a reasonable manner [i.e., with tables, chairs, lighting, air conditioning, or heat if possible, and the like] during the normal business hours, or, in lieu of agreement on that, from 8:00 a.m. to 5:00 p.m.

3. The producing party shall designate one of its regular employees to be available to instruct the interrogating party in the nature and use of the records-retention system involved. That person shall be one who is fully familiar with the records system, and, if a question arises concerning the records which the designated person cannot answer, the Court expects the producing party to act reasonably and cooperatively in locating someone who knows the answer to the question.

4. The producing party shall make available any computerized information or summaries thereof which it either has, or can reasonably generate, from existing data and programs. A party's

obligation to undertake additional programming for the production of computer-stored information will be addressed by the Court on a case-by-case basis.

5. The producing party shall provide any relevant compilations, abstracts or summaries, either in its custody or reasonably obtainable by it, not prepared in anticipation of litigation. If it has any documents even arguably subject to this clause but which it declines to produce for some reason, it shall object on the record and call the circumstances to the attention of the parties and the Court.

6. All of the actual clerical data-extraction work shall be done by the interrogating party, unless agreed to the contrary, or unless after actually beginning the effort it appears that the task could be performed more efficiently by the producing party. In that event, the interrogating party may approach the Court for reconsideration of the propriety of the Federal Rule 33(d) election. In other words, it behooves the producing party to make the document search as simple as possible, or the producing party may be required to answer the interrogatory in full on consideration of the Federal Rule 33(d) election.

7. If it appears likely that the full answer may not or will not be derived from the documents produced, the order may contain a clause recommending that the Court at trial not admit evidence covered by the scope of the interrogatory to the extent that any portion of the answer was not contained in the documents produced under the Federal Rule 33(d) election. Other provisions or sanctions may also be appropriate.

V. REQUESTS FOR ADMISSION.

A. Responses to Requests for Admission. Federal Rule 36 is followed in this District in accordance with its terms, and, in light of the serious consequences of an improper response (or failure

to respond), every responding party should carefully re-read Federal Rule 36, which requires more of a response than many lawyers seem to believe.

For example, if a party does not respond or object to a request for admission within 30 days after service, the matter is automatically admitted. Such admission can only be withdrawn by a ruling of the Court upon a properly filed motion. Nothing herein should be taken as discouraging the usual courtesy expected from lawyer to lawyer, including agreement to reasonable extensions of time.

Additionally, an answering party may not give lack of information as a reason for failure to admit or deny unless such party states that he or she has made reasonable inquiry and that the information known or readily obtainable by the answering party is insufficient to enable said party to admit or deny.